Wise Alloys, LLC *and* International Brotherhood of Electrical Workers, Local 558. Case 10–CA–34319

August 31, 2006

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On September 14, 2005, Administrative Law Judge Keltner W. Locke issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief. The Respondent filed a cross-exception.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

In the underlying case, the Board found that the Respondent violated Section 8(a)(5) by unilaterally discontinuing its exclusive use of the Union's hiring hall. The instant issue is whether certain individuals, including William Ledgewood, would have been hired at the Respondent's Alloys plant if the exclusive use of the hiring hall had not been discontinued. The judge found that Ledgewood would not have been so hired, and thus no remedy is due for him. We agree.

The Respondent hired Ledgewood in 1999 at its Southern Reclamation plant. He was transferred to the Respondent's Alabama Reclamation plant and laid off from that facility in February 2003.[3] During Ledgewood's layoff, the Union referred him for employment as an overhead crane operator at the Respondent's Alloys plant. He was interviewed on March 26. However, on March 17, the Respondent decided to recall him to work at the Alabama Reclamation plant, effective March 31.

The judge found that the Respondent's human resources director, Sandra Scarborough, credibly testified that the Respondent did not hire Ledgewood to fill the position at the Alloys plant because it had previously decided to recall him to its Alabama Reclamation facility. There is no basis for disturbing this finding. The Union's hiring hall procedures recognize the right of an employer "to reject any applicant for employment." By rejecting Ledgewood's application for the Alloys plant position and instead retaining him in his former job, the Respondent avoided having to deprive one plant (Alabama Reclamation) of an experienced employee who was needed there and then retrain him for a new job at a different facility (Alloys). We agree with the judge that it would have made no business sense for the Respondent to have hired Ledgewood at the Alloys plant under these circumstances.

Our dissenting colleague asserts that this argument was not advanced by the Respondent, and that it therefore should not be considered. We disagree. The Respondent argued to the judge that it did not hire Ledgewood for an Alloys position because it had previously decided to recall him to its Alabama Reclamation facility. The recall decision is evidence that Ledgewood was needed at Alabama Reclamation, and there is no contrary evidence on that point. As our dissenting colleague notes, it is self-evident that it would have made no business sense to hire Ledgewood at the Alloys plant when he was needed elsewhere. The Respondent was not obligated to have its witness testify to this self-evident conclusion.

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[1] The General Counsel has in effect excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed to the judge's finding that the General Counsel was foreclosed from challenging the lawfulness of the Respondent's unilateral implementation of new selection criteria for overhead crane operator positions at its Alloys plant in Muscle Shoals, Alabama. Chairman Battista and Member Schaumber accordingly find it unnecessary to pass on the judge's discussion of waiver, acquiescence, and the "closely related" test set forth in *Redd-I, Inc.*, 290 NLRB 1115 (1988), for the application of Sec. 10(b).

We affirm the judge's finding that the Respondent did not significantly depart from those new selection standards by hiring Joseph Spurgeon as an overhead crane operator. In doing so, we rely on evidence showing that the Respondent was aware when it hired Spurgeon that he had operated an M88 tank in the military and that the Respondent knew that this constituted experience operating heavy mobile equipment. We grant, however, the General Counsel's motion to strike the section of the Respondent's answering brief detailing the specific characteristics of the M88 tank.

[2] We shall modify the judge's recommended Order to conform to the Board's standard remedial language and, in accordance with the General Counsel's exceptions and the Respondent's cross-exception, to reduce the backpay award to Melvin R. Jones to $14,848, exclusive of interest and tax withholdings.

In light of the Board's disposition of this case, Chairman Battista and Member Schaumber find it unnecessary now to decide issues concerning the validity of *J. E. Brown Electric*, 315 NLRB 620 (1994) (instatement and backpay remedy for applicants who would have been referred were it not for employer's unlawful conduct). See *Wise Alloys*, 343 NLRB No. 60, slip op. at 1 fn. 3 (2004).

[3] All dates are 2003 unless otherwise indicated.

We recognize that the Respondent interviewed Ledgewood on March 26 for a job at the Alloys plant, and that this was after it had decided on March 17 to recall Ledgewood to the Alabama Reclamation plant. However, we see no inconsistency in the Respondent's conduct. There is no evidence that, under the hiring hall procedures, the Respondent was entitled to refuse to interview a union referral. The Respondent interviewed all of the other alleged discriminatees in this case as well. Accordingly, and contrary to our dissenting colleague, the Respondent's consideration of Ledgewood's application does not call into question its decision not to hire him, just as its consideration of the other referrals does not call into question its subsequent decisions not to hire them.

No party has argued that the Respondent's decision to interview Ledgewood undercuts its defense. That contention is presented for the first time by our dissenting colleague, who also maintains that arguments against his position should not be considered because the Respondent has not advanced them. But the Respondent cannot be faulted for failing to anticipate an argument not made by any party. In responding to the dissent, we have considered all of the evidence in this case. As shown, it does not support our colleague's position.[4]

[4] In Member Walsh's view, the Respondent's decision to recall Ledgewood to the Alabama Reclamation facility does not establish that, absent its unlawful avoidance of the Union's hiring hall, it would still not have hired Ledgewood as an overhead crane operator at the Alloys plant. The Respondent needed overhead crane operators at the Alloys plant and concedes that Ledgewood was qualified for the position. Moreover, the Respondent interviewed Ledgewood for a job at the Alloys plant even after initiating the recall process. Apparently, then, the Respondent did not see its recall decision as a bar to hiring Ledgewood for the Alloys plant. Further, there is no evidence that the Respondent opposed transfers between plants. To the contrary, Ledgewood had himself transferred between facilities. Nor has the Respondent established that Ledgewood abandoned interest in the overhead crane operator position by accepting the recall to his former position.

The majority adopts the judge's rationale that it would have made "no business sense" to hire Ledgewood at the Alloys plant when he was needed at the Alabama Reclamation facility. Notably, however, the Respondent never presented this argument, seemingly self-evident if supported by the facts, to the judge. See *Inland Steel Co*., 257 NLRB 65, 67–68 (1981), enfd. mem. 681 F.2d 819 (7th Cir. 1982) (judge erred in relying on defense not raised by the respondent); see also *Midwest Generation*, 343 NLRB No. 12, slip op. at 8–10 (2004) (Walsh, dissenting), reversed and remanded, *Electrical Workers Local 15 v. NLRB*, 429 F.3d 651, 657–659 (7th Cir. 2005), petition for cert. filed 74 U.S.L.W. 3587 (U.S. Apr. 4, 2006) (No. 05-1279). The majority also attempts to discount the significance of the Respondent's decision to interview Ledgewood, and the odd timing of that decision, by asserting that it may have been obligated to interview all union referrals. Again, this would have been an obvious defense for the Respondent to raise if it were supported by the facts, but the Respondent itself never suggested that it was under such a duty. In sum, after carefully considering the record evidence in light of the arguments actually made by the parties themselves, Member Walsh would find that the Respondent has failed to establish that, absent its unlawful conduct, it would not have hired Ledgewood as an overhead crane operator at the Alloys plant. Accordingly, Member Walsh would order the Respondent to offer Ledgewood instatement to this position with appropriate backpay.

ORDER

The National Labor Relations Board orders that the Respondent, Wise Alloys, LLC, Muscle Shoals, Alabama, its officers, agents, successors, and assigns, shall make whole Melvin R. Jones by paying him $14,848, plus interest to the date of payment as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws.

Dated, Washington, D.C. August 31, 2006

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Katherine Chahrouri, Esq., for the General Counsel.
William G. Miossi, Esq. and *Gina M. Petro, Esq. (Winston & Strawn, LLP)*, of Washington, D.C., for the Respondent.
Larry Farmer, for the Charging Party.

SUPPLEMENTAL DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on July 11 and 12, 2005 in Sheffield, Alabama. After the parties rested, I heard oral argument, and on July 13, 2005, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1]

Summary

Respondent's obligations to make whole those injured by the unfair labor practices in this case will be satisfied by providing backpay for Melvin R. Jones in the amount of $16,315.03, together with interest, and minus required withholdings for Federal and State tax. The record does not establish that any of the other individuals named in the compliance specification would have been hired by Respondent in any event, and therefore does not establish that these individuals suffered any injury attributable to Respondent's unfair labor practices.

[1] The bench decision appears in uncorrected form at pp. 393 through 411 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as appendix A to this Certification.

Background

In *Wise Alloys*, 343 NLRB No. 60 (2004), the Board affirmed and adopted, as modified, the decision of the Honorable Pargen Robertson, finding that Respondent had a past practice of using the Union's hiring hall as the exclusive source of job applicants for electrical technician and crane operator positions. This practice existed before November 1, 2002, when Respondent and the Union entered into a collective-bargaining agreement which included the following language: "All hiring practices remain as is [as established prior to 4/1/99] Electrical Tech & Crane Operators."

Based upon the testimony he credited, Judge Robertson concluded that by agreeing to this language, Respondent bound itself to use the Union as the exclusive referral source when filling electrical technician and crane operator positions. The Board adopted this conclusion and Judge Robertson's further finding that in early 2003, without first notifying the Union and affording it an opportunity to bargain, Respondent failed to use the Union's hiring hall as the exclusive referral source, thereby violating Section 8(a)(5) and (1) of the Act.

The Board ordered Respondent "to hire exclusively from the Union's hiring hall to [fill] electrical technician and crane operator positions under the Union's jurisdiction." It also added the requirement that Respondent must provide an "instatement and backpay remedy for those applicants who would have been referred to the Respondent by the Union for employment were it not for the Respondent's unlawful conduct."

However, the Board did not determine which individuals, if any, suffered harm because of Respondent's unlawful unilateral change. Instead, the Board ordered that instatement and backpay issues would be resolved by a factual inquiry at the compliance stage.

Therefore, I must identify which individuals, if any, would have been hired but for Respondent's unfair labor practice. Further, I must determine the amount of backpay necessary to make each such individual whole for losses caused by the unfair labor practice.

Respondent's Job Selection Criteria

One issue addressed in the bench decision concerns the job selection criteria for overhead crane operator positions. This issue implicates subtle and possibly controversial principles of law, so it will be discussed at greater length below.

Respondent established stricter criteria in late 2002 or early 2003, without first notifying the Union or affording it an opportunity to negotiate concerning the contemplated change. In March 2003, at Respondent's request, the Union referred a number of candidates for overhead crane operator positions. Respondent interviewed but did not hire any of these individuals, whose names now appear in the compliance specification. The General Counsel seeks an order requiring Respondent to offer them employment and to pay them backpay.

Respondent asserts that the job applicants referred by the Union did not satisfy the new education and experience standards and, accordingly, it has no duty to provide them either instatement or backpay. However, the General Counsel and the Union challenge the applicability of the standards because Respondent adopted them unilaterally and, arguably, unlawfully.

Although the Government wishes the Board to consider the lawfulness of the unilaterally-adopted employment criteria, Respondent contends that the Union's conduct has removed this issue from consideration. In other words, Respondent is invoking a doctrine of issue preclusion. In agreement with Respondent, the bench decision held that the lawfulness of the job criteria may not be challenged now. The discussion below will amplify on that reasoning.

After Respondent promulgated the stricter employment criteria, the Union filed an unfair labor practice charge alleging that Respondent had failed to bargain in good faith, in violation of Section 8(a)(5) of the Act. This charge, docketed as Case 10–CA–34317, was separate from the charge giving rise to the present proceeding.

The Board has a longstanding policy allowing a Regional Director to defer action on certain types of unfair labor practice charges when the charging party and the charged party have an established collective-bargaining relationship and have agreed to a grievance resolution procedure. *Collyer Insulated Wire*, 192 NLRB 837 (1971) and *United Technologies Corp.*, 268 NLRB 557 (1984). This deferral policy serves two purposes. It conserves the Board's resources and fosters the bargaining relationship by allowing the parties to resolve the dispute through the process they have mutually established.

The Regional Director for Region 10 deferred action on the charge in Case 10–CA–34317 and the issue proceeded through the parties' grievance procedure. Less than a week before the scheduled arbitration, the Union's new business manager suggested to Respondent that they cancel the arbitration, and Respondent did so by e-mail to the arbitrator.

As discussed in the bench decision, crediting the testimony of this union official, Larry Farmer, I found that Respondent and the Union had not reached an agreement resolving the grievance. Rather, the Union proposed and then acquiesced in the cancellation of the arbitration even though the parties had not reached agreement.

The Union then requested withdrawal of the charge which had been deferred to arbitration. The Acting Regional Director approved this withdrawal request on January 6, 2005. That was more than 2 months *after* the Board issued its decision in the present matter, finding that Respondent unlawfully had failed to use the Union's hiring hall as its exclusive source of job applicants for crane operator positions.

In the bench decision, I concluded that the Union's acquiescence in cancelling the arbitration, together with its subsequent withdrawal of the unfair labor practice charge, removed one possible challenge to Respondent's use of the newly-written job standards. Although these qualifications might still be open to question for some other reason, it was too late now to assail the standards because they allegedly had been promulgated unilaterally.

As discussed in the bench decision. I hesitate to reach this conclusion through a traditional waiver analysis. The present facts would put considerable strain on the principle that the waiver of a statutory right must be clear and unequivocal.

The Union had not waived its right to bargain about the standards at the time Respondent applied them to the job candidates. The Union's later withdrawal of the unfair labor practice

charge certainly evinced a clear and unequivocal intention not to litigate whether Respondent violated Section 8(a)(5) by promulgating the new hiring criteria unilaterally, but whatever else the withdrawal may have manifested is not quite so clear. The request to withdraw its charge in Case 18–CA–34317 does not announce in clear and unequivocal fashion the Union's intent to waive the right to challenge the validity of the hiring standards should that issue arise in some other context, such as the present case.

Nonetheless, the Union's decision to seek cancellation of the arbitration and to request withdrawal of the unfair labor practice charge certainly signals acquiescence. In *Manitowoc Ice, Inc.*, 344 NLRB 145 (2005), a union sought during contract negotiations to bargain concerning changes in the employer's profit-sharing plan. The employer's negotiators refused, asserting that it long had been a "nonnegotiable management prerogative" to change the terms of this plan unilaterally. The union did not file an unfair labor practice charge concerning the employer's refusal to bargain. Later, during the term of the contract, the employer again changed the profit–sharing plan unilaterally. The union filed a charge.

Dismissing the complaint, the Board applied principles of equitable estoppel: "[W]e find that the Union has acquiesced in the Respondent's position that the terms of the profit-sharing plan are a management prerogative and that, therefore, it is now equitably estopped from asserting otherwise."

In the present case, I also conclude that the Union's actions—proposing to Respondent that the arbitration be cancelled and thereafter requesting withdrawal of the charge—signalled its acquiescence. However, several differences should be noted between the present facts and those in *Manitowoc Ice*.

The doctrine of equitable estoppel addresses the harm which may result when one person relies, to his detriment, on the message communicated to him by another. In *Manitowoc Ice*, the union's acquiescence during bargaining led the employer to believe it could continue to make unilateral changes in the profit-sharing plan. When the employer later acted in reliance on this understanding, the union could hardly object.

The chronology in the present case makes it difficult to find detrimental reliance. There is no evidence that the Union said or did anything, before Respondent's promulgation of the criteria in early 2003, which would have led Respondent to believe it had the Union's permission.

The Union filed its unfair labor practice charge on March 25, 2003, only about 2 to 3 months after Respondent promulgated the job criteria in question. Thus, the Union did not manifest condonation by failing to act.

Judge Robertson conducted the initial hearing in the present case on January 26–27 and June 14, 2004. Almost exactly a month after that hearing closed, the Union's new business manager decided not to proceed to arbitration on the grievance. The Board issued its Decision in the present case on October 29, 2004. The Acting Regional Director approved the Union's request to withdraw the charge in Case 18–CA–34317 on January 6, 2005.

This sequence of events does not reveal any way in which Respondent relied to its detriment on any statement or representation of the Union. Thus, the present facts fit uncomfortably with traditional concepts of equitable estoppel.

The chronology does show that the General Counsel had ample time to consolidate Case 18–CA–34317 with the present case before the hearing. Such consolidation would have placed both alleged unilateral changes—the promulgation of new hiring criteria as well as the bypassing of the Union's job referral procedure—before the judge and the Board at the same time. Instead, the General Counsel elected to place the latter allegation before the Board and, in effect, to send the former to an arbitrator.

Rather than pursuing this issue through the arbitration process at its own expense, the Union decided request withdrawal the charge. However, the Union's withdrawal request did not end the matter. Section 102.9 of the Board's Rules provides that a "charge may be withdrawn, prior to the hearing, only with the consent of the Regional Director with whom such charge was filed. . . ." A regional director, exercising authority delegated by the General Counsel, may decide that the public interest requires prosecution even if the charging party does not wish to proceed.

In this instance, however, the Regional Director approved the Union's withdrawal request. Allowing the Union to withdraw the charge constituted an act of prosecutorial discretion, a decision not to litigate the lawfulness of Respondent's hiring criteria. In these circumstances, it would be inequitable to allow the General Counsel to exhume the issue he already had buried. Therefore, I conclude that the General Counsel is estopped from doing so.

The Standards As Actually Applied

Respondent did not adhere to the letter of the written criteria it promulgated in early 2003. In practice, it applied somewhat less hiring onerous standards. For example, as the bench decision notes, Respondent would accept a G.E.D. certificate in lieu of a high school diploma.

Although I have concluded that the criteria which Respondent promulgated in early 2003 may not now be challenged, the relevant criteria are those Respondent actually applied, not those which existed merely on paper. Thus, I would conclude that an applicant with a G.E.D. satisfied the Respondent's education requirement.

It may be argued that Respondent did not apply as stringent an experience requirement as the literal wording of the written criteria might suggest. The written standard required 2 years' experience operating either an overhead crane or "heavy industrial mobile equipment." The strictness of this standard depends on what Respondent considered to be "heavy industrial mobile equipment."

In March 2003, Respondent hired Joe Tabor to become an overhead crane operator. Although Tabor had no experience operating that type of crane, he had experience with smaller cranes and also driving a boom truck and backhoe. Respondent necessarily must have considered such experience qualifying because it hired Tabor.

Similarly, Respondent offered an overhead crane operator position to Melvin Randall Jones in August 2003. In oral argument, the General Counsel noted that Jones had no prior

experience operating overhead cranes. However, Jones' job application indicates he did have experience operating overhead cranes for Southern Fabrication. He also had experience driving a 50-ton dump truck and transporting explosives. In these circumstances, based on the present record, I conclude that Respondent's offering Jones employment does not mark a departure from its job criteria.

To support the argument that Respondent did not follow its own job criteria, the General Counsel notes that Respondent hired Joseph Spurgeon to be an overhead crane operator notwithstanding that Spurgeon lacked the requisite experience operating an overhead crane or other heavy industrial equipment. Spurgeon did not testify, and I hesitate to assume too much about his work experience based only on his job application, which is in evidence.

The application does indicate that Spurgeon had a military career driving and commanding tanks. Although a tank isn't heavy *industrial* equipment, it certainly is heavy equipment. More importantly, a military tank typically carries highly explosive ordnance. Operating it entails safety risks of the same magnitude as those associated with an overhead crane.

In the absence of expert testimony, I would not speculate about the relative damage which could result from a mishap involving an overhead crane carrying 15 tons of metal and that caused by the explosion of an artillery shell, but in both cases, the harm could be great. Accordingly, I do not believe that Respondent's acceptance of Spurgeon's military experience in lieu of industrial experience marks a departure from its job standards.

The General Counsel also argues that Respondent departed from its written standards by hiring Paul Grigsby, who applied for work as an overhead crane operator on about April 1, 2003. Grigsby did not testify. However, Human Resources Director Scarborough credibly testified that Grigsby operated heavy equipment in his logging business. Such equipment included cranes, which he used to move and stack logs. Grigsby's job application is consistent with this testimony, which I credit. Accordingly, I conclude that Grigsby's employment does not establish a departure from Respondent's written job criteria.

In oral argument, the General Counsel also referred to the testimony of Larry Gilbert, who was hired as an overhead crane operator in June 2000. Gilbert testified that he had no overhead crane experience at the time Respondent hired him. However, Respondent changed its hiring standards in late 2002 or early 2003. Gilbert's employment in 2000 cannot establish that Respondent departed from the standards it promulgated about 3 years later.

In sum, the General Counsel has not established that Respondent departed significantly from its written work experience requirements. Accordingly, I will use those requirements in examining the qualifications of the alleged discriminatees.

The Legal Standard

Respondent argues that in determining whether it would have hired any particular applicant to be an overhead crane operator, the Board should follow the procedure set forth in *FES*, 331 NLRB 12 (2000). The Board applies this framework in cases alleging a refusal to hire in violation of Section 8(a)(3) of the Act.

Respondent concedes in its trial brief that the present case does not concern an alleged violation of Section 8(a)(3) of the Act and that, accordingly, *FES* is not directly on point. However, Respondent argues that *FES* stands for a fundamental proposition which is as relevant here as in the 8(a)(3) context. Specifically, Respondent contends that the burden of proof remains on the General Counsel to show "that the applicants met the objective, quantifiable employment criteria and would have been hired *but for* the unfair labor practice [here—breach of an exclusive hiring all agreement]." (Respondent's brief at page 5; emphasis in original.)

The General Counsel disputes the proposition that *FES* applies in the current compliance proceeding, as it would at a hearing to determine liability, under Section 8(a)(3), for an alleged discriminatory refusal to hire. Instead, the Government argues, guidance should be drawn from *J. E. Brown Electric, Inc.*, 315 NLRB 620 (1994).

In *J. E. Brown Electric*, the Board established a policy concerning the appropriate remedy in cases such as the present one, involving an employer which had assumed the obligation of using an exclusive hiring hall but then unlawfully failed to do so. The Board held that the remedy for such a violation should include an order requiring the respondent to hire the applicants who had been denied employment because of the unfair labor practice.

Henceforth, the Board announced, it would "include reinstatement orders as a necessary part of the remedy in cases involving the repudiation of exclusive hiring hall provisions with the understanding that, as in *Dean General [Contractors*, 285 NLRB 573, 574 (1987)] reinstatement and backpay issues will be resolved by a factual inquiry at the compliance stage of the proceeding." *J. E. Brown Electric*, above, 315 NLRB at 623.

Quite clearly, the facts in the present case bring it within the ambit of *J. E. Brown Electric*, which I conclude is controlling. The application of *J. E. Brown Electric* rather than *FES* raises a question concerning the allocation of the burden of proof.

The *FES* framework requires the General Counsel initially to prove three elements pertaining to the respondent's intention to hire, the qualifications of the applicants, and the presence of antiunion animus. The second element concerns us here. The General Counsel must, under *FES*, prove that a job applicant had experience or training relevant to the announced or generally known requirements of the position for hire or, alternatively, that the employer had not adhered uniformly to such requirements or that the requirements themselves were pretextual.

In the present case, however, the issue of a job applicant's qualifications arises because Respondent raised it as a defense. Therefore, I conclude that Respondent bears the burden of proving a particular applicant unqualified. Additionally, in keeping with the Board's practice in compliance proceedings, I will resolve any uncertainty against the Respondent, which already has been found guilty of committing the unfair labor practice to be remedied.

The Alleged Discriminatees

A. William C. Clemons

Clemons testified that he did not have experience operating overhead cranes and "couldn't tell you a lot about them." However, he had operated other sorts of cranes and testified that he had "learned fairly easily and quickly" how to operate other types of cranes.

At the time of his job interview in March 2003, Clemons listed only one employer on his application. This was "Grand Rental Station," a company which rented industrial equipment to customers. On the job application, Clemons did indicate that he had experience operating boom trucks and other sorts of cranes.

The application does not disclose how much experience. Indeed, it doesn't even list how long Clemons worked at the Grand Rental Station.

In April 2005, Clemons attended a second job interview and completed another application form. One part of this form asked about the types of equipment the applicant had operated. Clemons listed jib crane, winch truck, boom crane, bobcat, forklift, and backhoe.

Another part of the form asked the applicant to list prior and current employers. Clemons listed employment as an X–ray repair technician and as a manager at several equipment rental stores. On its face, this list does not suggest that Clemons had spent much time operating any kind of crane. Yet Clemons testified that he had "been around heavy construction equipment all my life." The disparity between Clemons' rather expansive claim and the experience he listed raises some concern about his credibility as a witness.

According to Respondent's human resources director, Sandra Scarborough, Clemons could not demonstrate, during the job interview, that he had any experience actually operating the machines he had listed on the application. Scarborough credibly testified that Respondent did not hire Clemons because of his lack of experience.

The record clearly establishes that safety concerns motivated Respondent both in its issuance of written employment criteria and in the selection process. Human Resources Director Scarborough credibly testified:

> [S]afety is our number one item at the plant. We are a heavy industrial facility and for, safety is number one. When our candidates come in to work as crane operators, for them to be successful in our training orientation program, we feel that those people need to have these minimum requirements. Again, for safety purposes, we can't stress safety enough at our organization.

The Government does not allege that Respondent used the rubric of safety as a pretext for discrimination against union adherents. Indeed, this case doesn't involve any allegation of unlawful discrimination. Moreover, the record offers other evidence that safety concerns factored heavily in Respondent's evaluation of the job applicants. One of those applicants, Melvin Randall Jones, gave this description of the job interview:

> They asked me several questions. One that really sticks in my mind was if you was up in the crane and you seen someone do something unsafe, what would you do? And I told them I would report it, you know, because that is no place to have anything unsafe underneath a crane.

In view of Respondent's emphasis on safety, I conclude that Respondent would have rejected Clemons' application in any event, because he lacked experience operating heaving industrial machinery. Accordingly, I further conclude that Clemons is not entitled to instatement or backpay.

B. Jason M. Cooper

The Union referred Cooper to Respondent, and he attended a job interview in March 2003. According to Cooper, he told the interviewers that he didn't have any experience operating overhead cranes, but had done a lot of work with engine hoists and winches, and that he also had forklift experience. However, Human Resources Director Scarborough testified that Cooper indicated that he did not have any *work* experience operating such equipment. Rather, he had operated these machines outside of a work setting.

To the extent that Cooper's testimony may conflict with Scarborough's, based upon my observations of the witnesses, I credit Scarborough's. Moreover, Scarborough credibly testified that Respondent does not consider a forklift to be "heavy industrial equipment." It cannot lift the weight of loads to be moved in Respondent's operation. For example, Respondent uses dollies capable of moving 30,000 pounds.

In sum, Cooper did not have work experience operating an overhead crane or other machinery which Respondent considered to be heavy industrial equipment. Accordingly, Respondent rejected his application.

The evidence establishes that Respondent would not have hired Cooper in any event. Accordingly, I conclude that he is not entitled to instatement or backpay.

C. Jason E. Ingram

The Union referred Ingram and he attended a job interview in March 2003. There, he told Respondent's interviewers that he did not have work experience operating an overhead crane, but did have experience operating a type of lift attached to the roof of a building.

According to Scarborough, Ingram indicated that he had experience operating a pendant lift, winch truck, and "heavy equipment and rescue type vehicles," but none of these machines met its definition of "heavy mobile industrial equipment." Moreover, the application which Ingram submitted at the time of the interview did not list any of this experience. Indeed, it showed that at the time of the job interview, Ingram was working as a self-employed "professional videographer" who supervised six other video-camera operators. According to the application, Ingram had been doing this work for almost 10 years.

Ingram's application only listed two other jobs, which involved work as a switchboard operator and computer programmer. Nothing in this work history indicated experience operating heavy industrial equipment with potential for harm comparable to that of an overhead crane.

Indeed, errors in any of Ingram's past jobs would be highly unlikely to cause anything like the damage which would result from a 15-ton mass of metal being dropped in the wrong location or swinging out of control. Moreover, little if anything in the experience of a videographer, computer programmer, or switchboard operator would impart the skills necessary to operate heavy industrial machinery safely.

Accordingly, I conclude that Respondent would have rejected Ingram's application in any event. Therefore, I also conclude that he is not entitled to instatement or backpay.

D. Charlene M. Kasmeier

Pursuant to referral by the Union, Kasmeier attended a job interview on March 26, 2003. She told the five interviewers about her experience operating heavy construction equipment for contractors working on projects for the Tennessee Valley Authority. She also told the interviewers that she had some experience operating overhead cranes while the employees regularly assigned to that work were on strike.

Her application documents this experience. In the space to list machines and equipment operated, Kasmeier included, among other machines, "overhead with hand remote and cab." The fact that her experience included operating cranes with cabs is significant; the record suggests that Respondent did not consider operation of a crane using a hand remote, while standing on the shop floor, to be comparable.

Human Resources Director Scarborough credibly testified that Kasmeier had the work experience necessary to meet the qualifications, and I so find. But although Kasmeier met the experience standards, she did not satisfy the education requirement added by the Respondent's written standards. Specifically, she had not graduated from high school.

For the reasons already discussed, I have concluded that the lawfulness of the written standards must be presumed. Accordingly, I must conclude that Respondent lawfully denied employment to Kasmeier because she did not have a high school education. Therefore, I must also recommend that the Board find that Kasmeier is not entitled to instatement or backpay.

E. William A. Ledgewood

Referred by the Union, Ledgewood attended a job interview on March 26, 2003. At that time, he was already an employee of Respondent. Ledgewood testified that he began working for Respondent at its Southern Reclamation plant in November 1999 and then transferred to another of Respondent's facilities, called Alabama Reclamation, in June 2002. Ledgewood testified that Respondent laid him off sometime in February 2003.

During this layoff, the Union referred Ledgewood to Respondent for employment as an overhead crane operator at Respondent's Wise Alloys plant and he attended a job interview some time in the latter half of March 2003. Ledgewood recalled the interview as being around March 18 or 20, but other evidence indicates that it took place on March 26, 2003. During the interview, Ledgewood described his experience using a remote control box to operate cranes at Respondent's Alabama Reclamation facility.

The record establishes that Respondent recalled Ledgewood from layoff almost exactly at the time of the job interview, give or take a few days. From the record as a whole, I conclude that Respondent initiated the recall process around March 24, 2003.

The March 24, 2003 date is consistent with both Ledgewood's testimony and Respondent's evidence, even though Ledgewood and Respondent do not agree on the date of Ledgewood's job interview. As already noted, Ledgewood recalled the interview as taking place around March 18 or 20. He also testified that he did not receive the recall notice until *after* the interview. Thus, the March 24 date fits Ledgewood's chronology.

Respondent's evidence places the recall on about March 24, 2003 and the job interview 2 days later. Even with these dates, it remains quite possible that Ledgewood did not receive the recall notice until after the interview. In any event, Ledgewood did accept the recall and returned to work at the Alabama Reclamation facility.

The compliance specification alleges that Ledgewood's backpay period began on March 28, 2003. In other words, according to the General Counsel, Respondent should have put Ledgewood to work as an overhead crane operator on this date. However, by this date, Respondent already had recalled Ledgewood from layoff to resume his work at Respondent's Alabama Reclamation facility.

By recalling Ledgewood to the position he held at the time of layoff, Respondent obtained the needed services of an employee who already knew how to do his job, operating cranes by remote control. If Respondent had cancelled Ledgewood's recall and then hired Ledgewood for the overhead crane operator position, it would have had to train him. Ledgewood had no experience operating a crane from a cab. It made no business sense to deprive one plant of an experienced employee who was needed there and then retrain this worker for a new job at a different facility.

Human Resources Director Scarborough credibly testified that Respondent did not hire Ledgewood to fill the overhead crane position because it had recalled him from layoff. Accordingly, I conclude that Respondent would not have offered Ledgewood the overhead crane operator position in any event, not because he lacked any qualifications but because Respondent already had recalled him to a different job. Therefore, I recommend that the Board find that Ledgewood is not entitled to instatement or backpay.

F. Rickie G. Scoggins

Referred to Respondent by the Union, Rickie G. Scoggins attended a job interview in March 2003. However, Respondent did not hire him for an overhead crane operator position.

Scoggins previously had worked for Respondent as a laborer, but had no experience operating overhead cranes. He did claim experience working with overhead cranes of the remote-control type, but did not mention this experience on his job application, which lists his past jobs as "groundman" and laborer.

Under the heading "List Machinery or Equipment Operated," Scoggins put "carrier deck" and "boom truck." In his testimony, Scoggins explained that a "carrier deck" was a small crane used for carrying heavy metal parts. Scoggins' use of the word "small" certainly suggests that the carrier deck was not

the sort of equipment used by Respondent to lift 15 tons or more.

Human Resources Director Scarborough testified that Respondent did not hire Scoggins because he did not meet the job experience requirement. Crediting that testimony, I conclude that Respondent would not have hired Scoggins in any event. Therefore, I further conclude that he is not entitled to instatement or backpay.

G. Melvin Randall Jones

In March 2003, the Union sent Jones to Respondent to be interviewed for an overhead crane operator position. On the application which Jones submitted at the time of the interview, he listed a number of different jobs, including operation of an overhead crane for another company, Southern Fabrication, and operation of "cherry picker" lift trucks for the Tennessee Valley Authority. This latter employment involved loading rebar and concrete forms. The application showed that Jones also had work experience as a truckdriver carrying explosives and as the operator of a 50-ton dump truck.

Respondent did not hire Jones immediately, but did offer him employment on August 2, 2003. Jones declined, because he already had taken a job with another employer.

Respondent's offer of employment clearly signifies that Jones met Respondent's job requirements. However, Respondent did not offer him employment at the time he applied, but instead filled that job opening from a source other than the Union. Therefore, I conclude that Respondent's violation of Section 8(a)(5) and (1) caused harm to Jones which must be remedied.

Because Respondent already has offered, and Jones already has declined employment, an order of instatement is not appropriate. However, Respondent must make Jones whole, with interest, for the losses he suffered because it did not offer him employment on March 28, 2003.

The General Counsel has established, and I find, that Jones' backpay period begins on March 28, 2003, and ends on August 3, 2003. Additionally, based on the record as a whole, I conclude that the General Counsel has established that the backpay formula alleged in the compliance specification is appropriate with respect to Jones. Further, I conclude that paragraph 7 of the specification correctly identifies the appropriate representative employees.

The record establishes that Jones had no interim employment during the backpay period. He accepted employment with another employer, SCA Tissue North America, LLC, immediately before he received Respondent's job offer and it does not appear that Jones did any work for this employer during the backpay period. To the extent that the record is unclear concerning when Jones began work with SCA, I resolve that uncertainty in favor of Jones rather than Respondent. Therefore, I conclude that no interim earnings should be deducted from his backpay.

In sum, I conclude that Respondent's obligation to make Jones whole will be satisfied by the payment of $16,315.03, as alleged in specification appendix H, together with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State Laws.

CONCLUSION

The General Counsel has established that Melvin Randall Jones suffered losses because of Respondent's violation of Section 8(a)(5) and (1) found by the Board in *Wise Alloys*, 343 NLRB No. 60 (2004). The General Counsel has not established that any of the other individuals named in the compliance specification suffered harm, because the evidence establishes that Respondent would not have hired them in any event.

Respondent will satisfy its obligations to make whole persons affected by its unfair labor practices by paying to Melvin R. Jones the amount of $16,315.03, together with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State Laws.

ORDER

It is hereby ordered that the Respondent, Wise Alloys, LLC, Sheffield, Alabama, its successors and assigns, shall forthwith provide backpay for Melvin R. Jones in the amount of $16,315.03, together with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State Laws.

Dated, Washington, D.C. September 14, 2005

APPENDIX A

BENCH DECISION

In *West Alloys, LLC*, 34[4] NLRB No. 60 (October 29, 2004), the Board determined that the Respondent violated Section 8(a)(5) and (1) of the Act by making certain unilateral changes in terms and conditions of employment without first notifying the exclusive bargaining representative and affording it the opportunity to bargain. Pursuant to the Board's order, this proceeding will determine which employees, if any, have been harmed by Respondent's unlawful unilateral change, and the appropriate remedy.

Procedural History

Respondent operates a number of interrelated plants in northern Alabama. Employees at these various plants melt down used aluminum cans, chemically treat the molten aluminum, pour it into ingots, and transform the ingots into large rolls of thin metal destined to become new cans. A number of labor organizations represent units of employees involved in this process. The International Brotherhood of Electrical Workers, Local 558, which I will call the "Union" or the "Charging Party," represents the electrical technicians and crane operators.

Before Respondent began operating the facilities on April 1, 1999, the Union had a longstanding collective-bargaining relationship with the predecessor employer, Reynolds Aluminum. After the change in ownership, the Respondent recognized the labor organizations which had represented the predecessor's employees.

On November 1, 2002, Respondent entered into an agreement with the Union to continue the hiring practices which had been in effect before April 1, 1999. That meant that Respondent would rely on the Union as its exclusive source of employees in the electrical technician and crane operator job classifications.

Nonetheless, in early 2003, Respondent used the Alabama State Employment Service as a source of job applicants and hired a number of them. The Union filed the unfair labor practice charge which began these proceedings.

On January 26 and 27, and June 14, 2004, the Hon. Pargen Robertson conducted an unfair labor practice hearing in Sheffield and Huntsville, Alabama. On July 23, 2004, Judge Robertson issued a decision finding that Respondent's failure to use the Union's hiring hall as its exclusive source of employees violated Section 8(a)(5) and (1) of the Act.

On October 29, 2004, the Board adopted Judge Robertson's decision, as modified. The Board ordered Respondent to cease and desist from "[u]nilaterally changing its practice of exclusively using the union hiring hall to select bargaining unit employees in the positions of electrical technician and crane operator."

The Board also ordered Respondent to restore "its past practice of exclusively using the Union hiring hall to select employees for electrical technician and crane operator positions" and to offer "immediate and full employment to those applicants who would have been referred to the Respondent by the Union for employment were it not for the Respondent's unlawful conduct" and to make them whole for any loss of earnings and other benefits suffered as a result of the Respondent's failure to hire them.

Respondent moved for reconsideration. On December 16, 2004, the Board issued an Order Denying Motion which stated, in part, as follows:

> The Respondent contends that the wording of paragraph 2(c) of the Board's Order could result in the Respondent's being compelled to hire applicants for nonexisting positions, or regardless of the applicants' qualifications, or both. However, paragraph 2(c) represents the Board's standard remedy for the unfair labor practice the Respondent committed. . . In addition, paragraph 2(c) further provides that the identification of employees to be instated, if any, is left to compliance, and the Respondent may appropriately raise its concerns regarding its hiring obligations under paragraph 2(c) at that stage.

On March 30, 2005, the Regional Director for Region 10 of the Board issues a Compliance Specification (the "Specification"). Respondent filed an Answer dated May 17, 2005 and amended it on May 23, 2005 and June 27, 2005.

On July 11, 2005, a hearing opened before me in Sheffield, Alabama. The parties presented evidence on that day and the next. Also on July 12, 2005, counsel presented oral argument.

Today, July 13, 2005, I am issuing this bench decision pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations.

The Issues

Several factors distinguish this case from a more typical compliance proceeding involving an employer found guilty of discriminating against certain employees because of their union activities, in violation of Section 8(a)(3) of the Act. The Board requires such a violator to reinstate employees unlawfully discharged and to make them whole for losses of pay and benefits.

The present case does not involve individuals who had been on Respondent's payroll but rather applicants for employment. The Act does protect such applicants against employment discrimination because of their union or protected concerted activities. However, in the present case, the government has not alleged and the Board has not found that Respondent discriminated in violation of Section 8(a)(3).

Rather, the Board found that Respondent breached its duty to bargain collectively with the Union by departing unilaterally from its past practice of using the Union's hiring hall as the sole source of applicants for employment as overhead crane operators. Without notifying or bargaining with the Union, the Respondent made contact with job applicants through Alabama's state employment service, and hired a number of them. This unlawful change in its hiring practices violated Section 8(a)(5) of the Act.

The Board did not find that Respondent failed or refused to hire any specific job applicant because of that person's association with, or activities on behalf of the Union. However, it did order Respondent to offer employment, and backpay, to the applicants adversely affected by Respondent's change in its hiring practices.

Accordingly, the General Counsel has named in the Specification a number of individuals alleged to have suffered losses because of the change in hiring practices. A distinction may be drawn, however, between the persons named in the present Specification and the "discriminatees" named in a typical compliance specification.

In the usual discrimination case arising under Section 8(a)(3), the Board's decision identifies the victims of discrimination. At the compliance hearing, the parties do not relitigate the issue of whether these named individuals suffered discrimination because the Board already has made that determination. The compliance hearing only concerns the proper remedy.

Thus, in that typical case, the names of individual "discriminatees" appear in the compliance specification because the Board itself already has found that they suffered harm. However, in the present case, the Board's decision does not name any particular person as having suffered because of the unfair labor practice.

The Specification does include the names of individuals to be made whole, but those names appear in the specification as a result of a prosecutorial decision to seek a remedy, not because the Board has found that these named individuals are entitled to a remedy.

Indeed, the Board's Decision made quite clear that it has not spoken concerning who, if anyone, is entitled to an offer of employment and backpay. To the contrary, the Board stated "Instatement and backpay issues will be resolved by a factual inquiry at the compliance stage of the proceeding." In ordering that Respondent offer employment to affected persons, the

Board included a footnote stating "We leave to the compliance stage the determination of which employees, if any, fall into this category."

One issue concerns how Paragraph 2(c) of the Board's October 29, 2004 Order should be interpreted. In that subparagraph, the Board ordered Respondent to:

> Offer immediate and full employment to those applicants who would have been referred to the Respondent by the Union for employment were it not for the Respondent's unlawful conduct and make them whole for any loss of earnings and other benefits suffered as a result of the Respondent's failure to hire them. [Footnote omitted.]

In rejecting Respondent's motion for reconsideration, the Board observed that "paragraph 2(c) represents the Board's standard remedy for the unfair labor practice the Respondent committed." However, the Board also reiterated that this paragraph "provides that the identification of employees to be instated, if any, is left to compliance. . ."

If the language in paragraph 2(c) is read literally, it fits uncomfortably with the facts concerning the referral system. Although Respondent had agreed with the Union to maintain the practices in effect before April 1999 (when Respondent took over the facility from the predecessor), Respondent did not have an obligation to hire every person the Union referred. To the contrary, the Union's own documents establish that Respondent did not have to hire any particular applicant.

In sum, rejecting an applicant did not constitute an unlawful unilateral change but was, instead, consistent with established practice. Construed literally, paragraph 2(c) of the Board's order would require Respondent to offer employment to any applicant the Union referred and thus itself would be a change in the established past practice. (Indeed, on its face, paragraph 2(c) would go even further, requiring Respondent to offer employment not just to an applicant who showed up with a Union referral slip, but also to someone who didn't even apply, if he *would have been referred* by the Union but for Respondent's unfair labor practices.)

As already noted, an order requiring Respondent to offer employment to anyone referred by the Union (let alone anyone who *would have been referred*) itself would constitute a change in the parties' past practice. But although Respondent was free to reject an applicant, it still had to rely on the Union as the exclusive source of job referrals. Respondent breached its duty to bargain in good faith not by rejecting an applicant but by arranging for referrals from another source, the Alabama state employment office.

The Qualifications Issue

The Board already has established that Respondent committed an unfair labor practice vis á vis the Union, but the General Counsel still bears the burden of proving that any particular person suffered injury as a result. Respondent asserts that the government cannot carry this burden because none of the applicants referred by the Union met the Respondent's established qualifications.

The record indicates that Respondent promulgated these new standards some time after taking over operation of the plants. Under the new criteria, in addition to being physically fit enough to climb the ladder to the crane and to perform the work, a job applicant had to meet two other criteria. According to the written standards, the applicant also had to have a high school diploma and at least two years' work experience operating an overhead crane in an industrial facility.

In practice, the standards were not quite as stringent as they appeared on paper. A general equivalency degree, or G.E.D., sufficed in lieu of a high school diploma, and experience operating heavy mobile industrial equipment could be substituted for experience on an overhead crane. Management concluded that each of the applicants referred by the Union lacked either the education or experience requirement.

From the record, it is not entirely clear when Respondent adopted these qualifications. According to a human resources official, Sandra Scarborough, the standards already were in effect in January 2003, when she began her job as Respondent's manager of employee relations. That was before the Union referred applicants to be considered for job openings as crane operators.

Retired business agent Wesley Thompson testified that he first saw a copy of the written qualifications for crane operator in early 2003, some time before Respondent asked the Union to refer applicants for that position. One of Respondent's crane operators, who is also a Union job steward, showed Thompson the qualifications.

That steward, Ricky Ritter, was working as a crane operator for the predecessor when Respondent took over the operation in 1999, and continued to work as a crane operator. He testified that he first saw the written qualifications in early 2003 and, before that time, was unaware of any written document setting forth such qualifications.

I have some concerns about Ritter's credibility. While testifying about his experience training new crane operators, Ritter expressed some opinions about their qualifications which appeared inconsistent with the rating he had given on their written evaluations. That inconsistency, when considered together with Ritter's substantial service as a Union steward, raise the possibility that Ritter's identification with the Union may have affected his objectivity as a witness.

However, no other evidence establishes that written job qualifications for crane operators existed before about 2003. Moreover, from the record as a whole, I get the general sense that Respondent placed greater emphasis on selection criteria than its predecessor did. Indeed, Respondent's efforts to "raise the bar" may have introduced a new tension between management and Union officials.

It would not be surprising to discover that Union officials believed that the new owners carried a whiff of hauteur into the collective-bargaining relationship. The requirement that new crane operators must have a high school diploma or the equivalent may have struck many as unnecessary for doing the job. People who had not graduated from high school particularly may have bristled at the diploma requirement and interpreted it as one indication of the new owners' attitudes about the local workforce.

Respondent's unilateral decision to go to the Alabama state employment service for job applicants—an action the Board

has found unlawful—communicates a similar hint of disdain for the Union and its members. Union officials might well think, if not say, "What's the matter? Aren't we good enough?"

Respondent's human resources manager Scarborough testified that after management had rejected the Union-referred applicants as unqualified, she contacted Union agent Thompson to ask that the Union refer more people. According to Scarborough, Thompson replied that he had sent over 8 good people already and the Union did not provide any additional referrals. This testimony, which I credit, does suggest that Respondent's new standards caused resentment.

On March 25, 2003, the Union filed an unfair labor practice charge against Respondent in Case 10–CA–34317. This charge alleged that on or about February 25, 2003, the Respondent implemented "Qualifications for Crane Operators' without notification to, or bargaining with the Union, in violation of Section 8(a)(5) and (1) of the Act."

On May 9, 2003, the Regional Director for Region 10 deferred the charge to arbitration pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971) and *United Technologies Corp.*, 268 NLRB 557 (1984). The parties selected an arbitrator and scheduled the hearing for July 20, 2004.

Six days before the hearing, a new Union business manager, Larry Farmer, took office. Farmer called a management official, John Misch, concerning the arbitration. Farmer testified that he said to Misch, "John, can we settle this thing? I see very little difference in this document and your document."

One of the two documents to which Farmer referred contained Respondent's crane operator qualifications and the other constitute the Union's proposed crane operator qualifications. "Basically," Farmer testified, except for one or two words, "they were one and the same."

Farmer suggested to Misch that they cancel the arbitration. On July 14, 2004, Respondent sent to the arbitrator an email cancelling the arbitration. The email began "This is to let you know that the above referenced case has been settled." However, I received the email in evidence for the limited purpose of establishing that the arbitration had been cancelled, and draw no conclusions from it as to whether the parties had, in fact, settled the underlying dispute.

Misch did not testify. Farmer's testimony is not entirely clear on this point, but it does not establish that the parties had entered into a settlement. Farmer's testimony suggests that he considered another unfair labor practice charge, the one which began the present case, to be expansive enough to preserve and resolve the issue concerning crane operator qualifications.

Stated another way, the present case raised the issue of whether Respondent made an unlawful unilateral change by seeking job applicants from sources other than the Union hall. The other charge, which the Regional Director had deferred to arbitration, concerned whether Respondent made an unlawful unilateral change by promulgating new qualifications for the crane operator position. It appears from Farmer's testimony that he considered the unfair labor practice charge now before us to be broad enough to raise the issue presented by the charge in Case 10–CA–34317.

Based on my observations of the witnesses, I believe that Farmer testified reliably. I do not find that Respondent and the Union reached a settlement of the matter deferred to arbitration in Case 10–CA–34317.

Nonetheless, Union Business Manager Farmer did suggest that the arbitration be cancelled and it was. Additionally, the Union requested to withdraw the charge in Case 10–CA–34317. On January 6, 2005, the Acting Regional Director approved the Union's withdrawal request.

In view of these events, Respondent argues that it acted lawfully in applying its crane operator qualifications to the applicants referred by the Union, and in rejecting them for failing to meet those standards. The General Counsel disagrees.

In one way, therefore, there is a possibility that the issues raised by the withdrawn charge, that is, the issues which would have been litigated before the arbitrator, could come back to life and demand to be resolved in this unlikely venue, a compliance proceeding. Respondent's counsel, however, views the Union's withdrawal of the charge in Case 10–CA–34317 as a silver stake through the heart of those issues.

Respondent has not specifically raised the affirmative defense that the time limitation in Section 10(b) of the Act precludes the Board from considering whether Respondent acted lawfully in applying the crane operator standards to the job applicants in 2003. However, I would note in passing that, applying the standards set forth in *Redd-I, Inc.*, 290 NLRB 1115 (1988), Respondent's alleged unilateral promulgation of new standards for the crane operator position and its unilateral decision to seek job applicants from sources other than the Union do appear to be "closely related." Therefore, I would conclude that Section 10(b) does not bar inquiry here into whether Respondent lawfully could reject job applicants because they did not meet the new qualifications.

Respondent does refer to the Union's withdrawal of the charge in Case 10–CA–34317 as effecting a waiver. However, the waiver of a statutory right must be clear and unequivocal. In requesting withdrawal of the charge, the Union obviously intended to give up its day in court on that issue, but it doesn't logically follow that the Union also intended to give up its statutory right to a place at the bargaining table.

A more persuasive argument is that the Union, by requesting to cancel the arbitration, acquiesced. Business Manager Farmer's testimony indicates that he did not consider the arbitration to be worth the cost because the crane operator qualifications proposed by the Union and the Respondent were the same except for a few words. That explanation certainly suggests a decision to acquiesce based upon a balancing of the burden of arbitration with the possible benefits that might result.

Farmer may also have thought that the Union would give up little by cancelling the arbitration because he believed the charge now before us would achieve the same result. Such a belief, however, would not change the consequences of the Union's decision not to proceed.

In sum, I conclude that because of the Union's decision to cancel the arbitration and, ultimately, to withdraw the charge which challenged the lawfulness of Respondent's crane operator standards, it is not appropriate to revive that issue here. This conclusion is quite critical to the outcome of this case.

Were I to address the issue, I would conclude that Respondent's promulgation of the new crane operator standards in early 2003 constituted a material, substantial and significant change in a mandatory term and condition of employment. Based upon the present record, I would also conclude that Respondent made this change without first notifying the Union and affording it the opportunity to bargain. This finding, that the Respondent had acted unlawfully in applying these unilateral standards, would compel a further conclusion that the Respondent could not use the standards to deny employment to applicants who failed to meet them. Instead, the lawfulness of Respondent's rejecting an applicant for want of qualifications would be judged based on the standards in effect before the unilateral change.

However, I have concluded that the time has passed for invalidating the standards as an unlawful unilateral change. In other respects, the standards do not appear to offend the Act. The record does not establish that Respondent advanced these standards as a pretext or adopted them because of antiunion animus. Whether or not the high school education requirement might be deemed to have a disparate impact under Title VII of the Civil Rights Act of 1964 is not relevant in the present proceeding.

The question remains as to whether Respondent lawfully could reject a Union-referred applicant on any basis. For reasons already discussed, I have concluded that paragraph 2(c) of the Board's Order does not compel Respondent to hire an applicant solely because he was referred by the Union.

Suppose for the sake of analysis that the employees in question were not crane operators but over-the-road truck drivers. Should the Union refer an applicant who lacked the necessary commercial driver's license, Respondent would have no obligation to hire that individual and the applicant would suffer no cognizable harm from being denied employment.

A finding that this particular applicant was not entitled to a remedy does not undercut the conclusion that Respondent violated the Act by failing to make the Union the exclusive source of referrals. It simply means that this individual was not harmed by the unlawful conduct. Only someone who has been injured must be made whole.

Having accepted the validity of the crane operator qualifications, I must determine whether Respondent failed to hire any of the alleged "discriminatees" who actually met those standards. This analysis does not entail a search for antiunion animus, which is irrelevant here. The government has not alleged discrimination in violation of Section 8(a)(3) or (4) of the Act.

Rather, I will examine the evidence to determine whether an individual's actual education and experience satisfied the stated requirements. If so, I will conclude that this person suffered harm which must be remedied. If not, I will find that the individual did not fall within the group affected by Respondent's unfair labor practices.

To allow for a detailed examination, carefully reviewing both the transcripts and the documentary evidence in each instance, and comparing the two, I will set out my findings with respect to each of these applicants in the certification of this bench decision.

More specifically, when the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include my determinations regarding the extent to which each of the alleged discriminatees suffered harm because of Respondent's unfair labor practices and the appropriate remedy.

Throughout this proceeding, Counsel have demonstrated a very high degree of professionalism and civility, which is truly appreciated. The hearing is closed.